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No. 02-1343

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION,
Petitioners,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL, INC., COALITION FOR CLEAN AIR, INC., COMMUNITIES FOR A BETTER ENVIRONMENT, INC., PLANNING AND CONSERVATION LEAGUE, AND SIERRA CLUB

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QUESTION PRESENTED

Whether section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a), preempts state and local clean air regulations that enhance the market for cleaner fleet vehicles, such as urban transit buses, without imposing any production mandates or other obligations on manufacturers.

RULE 29.6 STATEMENT

The respondents joining this brief are Natural Resources Defense Council, Inc., Coalition For Clean Air, Inc., Communities For A Better Environment, Inc., Planning and Conservation League, and the Sierra Club. Each is a non-profit organization and no parent or publicly held company owns 10% or more of any these organizations.

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STATUTORY PROVISIONS INVOLVED

Relevant portions of sections 101, 116, 177, 202, 203, 209, and 246 of the Clean Air Act, 42 U.S.C. §§ 7401, 7416, 7507, 7521, 7522, 7543, and 7586, are reprinted in the appendix to the brief filed by respondent South Coast Air Quality Management District. For ease of reference, in this brief we refer to those provisions by their section number in the Clean Air Act.

INTRODUCTION

The South Coast Air Basin—which includes Los Angeles and Orange Counties as well as parts of San Bernardino and Riverside Counties—"experiences the most serious air quality problems in the nation, primarily due to motor vehicle pollution." Pet. App. 5a. Respondent South Coast Air Quality Management District (the "District") concluded in a 1999 study that about 70% of the carcinogenic risk from air quality in the basin is attributable to "diesel particulate emissions," 20% to "other toxics associated with mobile sources," and about 10% to "stationary sources." J.A. 263. The District adopted the "Fleet Rules" at issue in this case to address the region's serious air quality problems, and in particular, to decrease the cancer and other health risks associated with diesel exhaust and other motor vehicle emissions. By 2010 the Fleet Rules are expected to eliminate at least 1,770 tons of dangerous smog-forming pollution in the South Coast region.[1] The respondents filing this brief—non-profit organizations dedicated to the protection of the environment and public health—intervened in the district

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[1] This number is the sum of the nitrogen oxides (NOx) reduction estimates from the staff reports for all six rules. The table of emissions reductions for Rule 1186.1 is located at volume 30 of the Administrative Record at 8651 (30 AR 8651), Rule 1191 at 25 AR 7450, Rule 1192 at 26 AR 7555, Rule 1193 at 27 AR 7874, Rule 1194 at 30 AR 8922, and Rule 1196 at 33 AR 9810.

court to defend the Fleet Rules, recognizing that they are an essential part of the region's efforts to achieve clean air.

Petitioners Engine Manufacturers Association and Western States Petroleum Association (the "engine manufacturers") claim that the Fleet Rules are preempted by section 209(a) of the Clean Air Act (the "Act"), which provides that states (other than California) and local governments may not adopt or attempt to enforce "standards relating to the control of emissions from new motor vehicles." In making this argument, the engine manufacturers deliberately ignore one of the core functions of the Act, which places the "primary responsibility" for reducing air pollution—whatever the source—in the hands of states and local governments. In fact, states *must* achieve clean air by specified deadlines, or face harsh penalties such as the loss of federal highway funds. That is why Congress preserved, through section 116, the states' historically broad authority to adopt any "standard" and "requirement," subject only to three limited exceptions (including the exception in section 209(a)). The engine manufacturers' theory of this case would render states and local governments powerless to control the dominant source of air pollution, namely, motor vehicles. Congress simply could not have intended to place the enormous responsibility to achieve clean air on the shoulders of states and their local governments, only to tie their hands and prevent them from reaching the main source of pollution.

Moreover, in hopes of redefining section 209(a) so that its otherwise limited preemption applies here, the engine manufacturers and the United States craft an overly broad definition of preempted "standards." They base their characterization of "standards" on various dictionary definitions that would require this Court to completely rewrite the motor vehicle provisions of the Act, including broadening the meaning of federal motor vehicle "standards" set forth in section 202; eliminating the Act's distinction between

"standards" and "requirements" in sections 209(e), 246, and 116; and deleting section 246's otherwise inconsistent mandate that states with unhealthful air quality adopt fleet purchase requirements.

Further, the engine manufacturers' overly expansive reading of "standards" in section 209(a) to include fleet *purchase* requirements simply because they "relat[e] to the control of emissions from new motor vehicles" would by necessity sweep *purchase* incentive programs into section 209(a)'s preemptive reach because these also "relat[e] to the control of emissions from new motor vehicles." States and local governments have long relied upon these incentive programs to control air pollution within their borders. While the United States recognizes that section 209(a) was never intended to preempt these critical incentive programs, it fails to distinguish them from the Fleet Rules.

The simple fact is that the only way to avoid rewriting the motor vehicle provisions of the Act is to interpret "standards" as the term is used elsewhere in these same provisions—as numeric *production* mandates imposed on manufacturers. Such an interpretation would necessarily exclude the Fleet Rules from the meaning of preempted "standards" in section 209(a), and is consistent with the central purpose of the Act to achieve clean air as expeditiously as possible. Further, an interpretation that saves the Fleet Rules from preemption would not undermine Congress's sole purpose in adopting section 209(a)—to protect manufacturers from having to *produce* new vehicles to meet emissions standards different from those adopted by California and the federal government. The Fleet Rules do no such thing, but instead merely require purchasers to choose the cleanest vehicles from among those already produced and certified for sale in California.

As the district court below correctly held, the Fleet Rules are not preempted "standards" because they "accept as given the existing [California] vehicle standards" and "impose no

new emission requirements on manufacturers whatsoever." Pet. App. 21a. For the same reasons, the court of appeals affirmed the district court's decision on the basis of its "well-reasoned opinion." *Id.* at 2a. The law is clear, and this Court should similarly affirm the decisions below.

STATEMENT

I. THE SOUTH COAST AIR BASIN'S "EXTREME" AIR POLLUTION PROBLEM.

The Clean Air Act charges the United States Environmental Protection Agency ("EPA") with the duty to establish National Ambient Air Quality Standards ("NAAQS"), which are the maximum levels of certain pollutants, including ozone (smog) and particulate matter, that are allowable in the ambient air. 42 U.S.C. § 7409. Under the Act, EPA classifies regions in the country as either being in "attainment" or "nonattainment" with the NAAQS. 42 U.S.C. § 7407(d)(1)(A). Under the 1990 Amendments to the Act, regions are further classified as being in "marginal," "moderate," "serious," "severe," or "extreme" nonattainment, according to the severity of their ambient levels of individual pollutants. 42 U.S.C. §§ 7502(a), 7511-7514.

The South Coast Air Basin ("South Coast") is the only region in the United States classified as an "extreme" nonattainment area for ozone, and is classified as a "serious" nonattainment area for particulate matter. 61 Fed. Reg. 10920, 10955 (Mar. 18, 1996); 58 Fed. Reg. 3334, 3337-38 (Jan. 8, 1993). The 1990 Amendments require the South Coast to meet the NAAQS for ozone by November 15, 2010, and for particulate matter by December 31, 2006. 65 Fed. Reg. 6091, 6100 (Feb. 8, 2000); 42 U.S.C. § 7511(a)(1)(Table 1); 42 U.S.C. § 7513(c)(2), (e).

Both ozone and particulate matter pose serious health threats. Ozone is known to contribute to respiratory illness,

decreased lung function, and premature death. J.A. 244-45. Particulate matter is comprised of microscopic particles that can bypass respiratory defense mechanisms and penetrate deep into the respiratory system. J.A. 248. The presence of large quantities of fine particles in the air has been shown to lead to higher mortality rates, greater occurrences and severity of asthma and cardiovascular disease, and a decline in children's lung function. J.A. 248.

The unhealthful air quality in the South Coast is "dominated by motor vehicle pollution." J.A. 80. In fact, "mobile sources are the single most important cause of ozone pollution, the nation's most widespread air pollutant." Waxman, Henry, et al., *Cars, Fuels, And Clean Air: A Review of Title II of the Clean Air Act Amendments of 1990*, 21 Envtl. L. 1947, 1950 (1991). Motor vehicles contribute more than half of the oxides of nitrogen ("NOx") and hydrocarbons found in the ambient air in the South Coast, J.A. 80, which react with sunlight to produce ozone. J.A. 244. Thus, ozone can be controlled effectively only by a strategy to control the NOx and hydrocarbon emissions from motor vehicles. Motor vehicles, especially diesel trucks and buses, are also significant sources of particulate matter. J.A. 256.

In addition, motor vehicles "are the predominant source of cancer causing air pollutants" in the South Coast. J.A. 256. A comprehensive study completed by the District in 1999—the Multiple Air Toxics Exposure Study ("MATES II")—showed that an overwhelming 70% of all cancer risk from air pollution comes solely from diesel particulate emissions. J.A. 263. That study followed the 1998 listing by the California Air Resources Board ("CARB") of diesel exhaust particulate as a "toxic air contaminant" under the California Health & Safety Code. *See* Cal. Code of Regs. tit. 17, § 93000 (2003). CARB listed diesel exhaust based on an exhaustive review of the scientific literature, including more than two dozen studies that showed that exposure to diesel exhaust increases

the risk of developing lung cancer and other non-cancer adverse health effects. 99-30 Cal. Reg. L. Bull. 383 (Jul. 23, 1999), *available at* 99-30 CRLB 383 (Lexis 1999). EPA has similarly found that long-term exposure to diesel exhaust poses a lung cancer hazard. EPA, Health Assessment Document For Diesel Engine Exhaust (May 1, 2002), *available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=29060.

It was in response to the alarming findings in the MATES II and other cancer studies, combined with the recognition that motor vehicles are the dominant source of smog and particulate pollution, that the District developed the six Fleet Rules at issue in this case.

II. THE PRIMARY ROLE OF STATES AND LOCAL GOVERNMENTS IN PREVENTING AND CONTROLLING AIR POLLUTION.

Congress enacted the Clean Air Act in 1963 to address the rapidly increasing levels of harmful air pollution throughout the United States. In section 101(b)(1), Congress declared that the central purpose of the Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."

When Congress first enacted the Act, it granted only limited powers to federal authorities, allowing them to intervene to abate interstate pollution in specified circumstances. *Train v. NRDC*, 421 U.S. 60, 63-64 (1975); Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392. Later amendments in 1965, 1967, 1970, 1977, and 1990 broadened the role of the federal government in the control of motor vehicle emissions but continued to place the principal responsibility for reducing air pollution on states and local governments. As Congress made clear in section 101(a)(3):

> [A]ir pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments.

See also Train, 421 U.S. at 64; *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976).

The primary role of states under the Act is consistent with the dominant role the states played in regulating air pollution prior to Congress's adoption of the Act in 1963. By 1963, forty states had adopted some form of air pollution control legislation. U.S. Dep't of Health, Education, & Welfare, A Digest of State Air Pollution Laws (Public Health Serv. 1963). While California was the first state to regulate motor vehicle emissions, starting in 1957, *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1109 n.26 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 952 (1980), by 1963 California was among seven states and the District of Columbia that had adopted legislation specifically addressing motor vehicle emissions. *See* U.S. Dep't of Health, Education, & Welfare, *supra*, at 11-19 (California), 39 (Colorado), 46 (District of Colombia), 92 (Indiana), 94 (Kansas), 115 (Michigan), 124 (New Hampshire), 139 (New York).

Congress's intent to leave to states and local governments the lead role in eliminating air pollution is echoed throughout the Act. *See, e.g.*, 42 U.S.C. § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State."); 42 U.S.C. § 7410(a)(1) (requiring states to submit implementation plans containing enforceable measures to attain the NAAQS). Indeed, the Act imposes harsh penalties on states that fail to achieve compliance with the NAAQS by the specified deadlines. *See, e.g.*, 42 U.S.C. § 7509(b)(1) (withholding federal highway funds for all projects in region). As this Court has recognized, the Act thus reflects Congress's "determination to 'tak[e] a stick to the States' in order to guarantee the prompt attainment and maintenance of

specified air quality standards." *Union Elect. Co.*, 427 U.S. at 249 (quoting *Train*, 421 U.S. at 64) (citations omitted).

To insure that states are capable of meeting the NAAQS on time, the Act provides broad authority to states and local governments to control mobile and stationary sources of air pollution. Congress did not, as the engine manufacturers suggest, Pet. Br. 3-4, divide the Act down the middle, limiting states and local governments to the regulation of stationary sources. While the Act contains requirements for state regulation of stationary sources, it also *mandates* that nonattainment areas adopt specified regulations to control mobile sources of pollution. 42 U.S.C. §§ 7511-7514. These additional requirements become increasingly stringent depending on the severity of air pollution in the region. For example, section 182 requires any state containing any part of a "serious" nonattainment area for NOx to adopt an "enhanced vehicle inspection and maintenance program." 42 U.S.C. § 7511a(c)(3). Further, states containing any part of a "severe" nonattainment area for NOx additionally are required to adopt "transportation control strategies . . . to attain reduction in motor vehicle emissions as necessary" to achieve attainment. 42 U.S.C. § 7511a(d)(1)(A).

Moreover, by 1990 Congress recognized that many regions would not meet the NAAQS without more aggressive mobile source measures, such as the use of clean fuels in motor vehicles, leading to enactment of section 246's clean-fuel vehicle mandate. *See* Sen. Comm. On Public Works, 103d Cong., 1st Sess., A Legislative History of the Clean Air Act Amendments of 1990, Serial No. 103-38, at 2572-2573 (1993) (Statement of Rep. Waxman). Section 246 requires states with any part of a serious, severe, or extreme nonattainment area for ozone or a nonattainment area for carbon monoxide to adopt a "clean-fuel vehicle program" mandating the purchase of new motor vehicles by certain fleet operators. *See also* 42 U.S.C. § 7511a(c)(4). Similar to

the Fleet Rules, a state's clean-fuel vehicle program under section 246(b) must "contain provisions requiring that at least a specified percentage of all new covered fleet vehicles . . . shall be clean-fuel vehicles and shall use clean alternative fuels when operating in the covered area." Notably, when Congress enacted section 246, it recognized that the District would be adopting its *own* clean-fuel vehicle fleet rules:

> In the meantime, *California would be proceeding along its own path, perceived at this time as mandating similar fleet requirements* plus diffusion of alternative-fueled passenger cars into the general auto market. California appears to believe that M85 (85% methanol) would be the fuel of choice for the foreseeable future—or at least until 2005.

H.R. Rep. No. 101-490, pt. 1, at 177 (1990) (emphasis added).[2]

Finally, in addition to the numerous mobile and stationary source regulations states and local governments are *required* to adopt, the Act explicitly preserves for states and local governments the broad authority they enjoyed prior to 1963 to control and prevent air pollution within their borders. As section 116 provides:

> [N]othing in [the Act] shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollutants.

This general authority reaffirms the right of states and local governments to adopt regulations that are different from or

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[2] This statement's reference to the development of alternative fuel vehicles running on "methanol" refers to Cal. Health & Safety Code § 40447.5 enacted by the California legislature just three years earlier in 1987. That provision authorized the District to adopt fleet rules requiring the purchase of vehicles that operate on "methanol or equivalently clean burning alternative fuel." *See* Statement, section IV, *infra*.

more stringent than federal regulations. *Union Elec. Co.*, 427 U.S. at 263-64. Contrary to the engine manufacturers' assertion, this general retention of state and local authority is not restricted to stationary sources. Rather, section 116 plainly states that the Act preempts only "*certain* State regulation of moving sources" of pollution (emphasis added). In fact, there are only three exceptions listed in section 116: (1) "standards" relating to new motor vehicles preempted by section 209(a); (2) "standards" respecting aircraft emissions preempted by 42 U.S.C. § 7573; and (3) certain regulation of fuel content preempted by 42 U.S.C. § 7545.

III. THE ACT'S COMPREHENSIVE SCHEME FOR ESTABLISHING EMISSIONS LIMITATIONS FOR THE PRODUCTION OF NEW MOTOR VEHICLES.

The comprehensive regulatory scheme for the setting and enforcing of new motor vehicle emission "standards" was adopted in 1965, when Congress amended the Act by adding sections 201 *et seq.*—the "motor vehicle provisions." Pub. L. 89-271, 79 Stat. 992 *et seq.* (1965). Section 202 requires EPA to adopt uniform federal "[e]mission standards for new motor vehicles or new motor vehicle engines." Such "standards" under section 202 apply to manufacturers and define the maximum amount (typically expressed in grams) of criteria pollutants that may be emitted from the tailpipe of each newly-produced motor vehicle, based on the vehicle's model year, weight, and horsepower. For example, under section 202(a)(3)(B)(ii), every heavy-duty diesel truck produced for the 1998 and later model years must emit no more than 4 grams per brake horsepower hour ("gbh") of NOx.

Section 203(a)(1) provides for enforcement of these "standards" by prohibiting "the sale, or the offering for sale, or the introduction, or delivery for introduction, into commerce" of a new motor vehicle or engine, unless the

manufacturer first obtains a "certificate of conformity" from EPA. A manufacturer can only receive a certificate of conformity once EPA has tested the vehicle to confirm that it conforms with the applicable emission standard under section 202. 42 U.S.C. § 7525(a)(1). The Act's scheme for the adoption and enforcement of federal emission standards relating to new motor vehicles thus controls the manufacture, but not the purchase, of motor vehicles. In fact, a "new motor vehicle" for purposes of these sections is defined as "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser." 42 U.S.C. § 7550(3).

Section 209(a) correspondingly prohibits states and local governments from adopting or enforcing new motor vehicle "standards" that are different from the federal standards, and also prohibits states from requiring their own certification or testing procedures to enforce EPA's standards. Section 209(a) provides:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

Section 209(a) was added in 1967 (as section 208(a)), when section 202 was reenacted without change. Pub. L. 90-148, 81 Stat. 499, 501. Both provisions were part of the National Emissions Standards Act. *Id.*, 81 Stat. 499.

The Act's scheme of requiring EPA to set national standards, and prohibiting states and local governments from adopting their own separate standards, is intended to protect

manufacturers from the "chaotic situation" that would result from having to produce vehicles to comply with 51 different state and federal emission standards. *See* Argument, section II.B.1, *infra* (citing, *e.g.*, S. Rep. No. 90-403, at 33 (1967); H.R. Rep. No. 90-728, at 21 (1967)).

Congress carved out one exception to this general prohibition in 1967 in recognition of California's uniquely serious air quality problem. Section 209(b) allows California to obtain a waiver from EPA to adopt and enforce its own new motor vehicle standards, as long as its "State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards."

In 1977, Congress further broadened state authority to adopt and enforce emission standards for new motor vehicles by adding section 177 to the Act. Section 177 allows states with nonattainment areas to adopt California's stricter emission standards for any model year, as long as the standards are "identical to the California standards for which a waiver has been granted for such a model year." Section 177 thus represents a compromise between the states' need for greater control over motor vehicle pollution to meet the NAAQS and the manufacturers' desire to be free from overly burdensome production mandates. *Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Envtl. Conservation*, 17 F.3d 521, 527 (2d Cir. 1994). In 1990, Congress added a second sentence to section 177, making clear that while states could adopt California's emission standards, they could not enforce those standards through different testing and certification methods in a way that would require manufacturers to create a "third vehicle" to sell in that state. *See* Sen. Comm. On Public Works, 103d Cong., 1st Sess., A Legislative History of the Clean Air Act Amendments of 1990, Serial No. 103-38, at 790 (1993) (exhibit 1 submitted by Sen. Mitchell).

California has exercised its right to adopt motor vehicle standards under section 209(b) multiple times. One such

example is CARB's Low-Emission Vehicle ("LEV") program, which establishes five categories of light- and medium-duty low-emission vehicles, including, in ascending order of stringency, transitional low emission vehicles ("TLEVs"), low emission vehicles ("LEVs"), ultra-low emission vehicles ("ULEVs"), super ultra-low emission vehicles ("SULEVs"), and zero emission vehicles ("ZEVs"). Cal. Code Regs. tit. 13, § 1961(a)(1), (e) (2003). As part of the LEV program, CARB established for each of these five categories numerical emission standards for key criteria pollutants for every class of vehicles (for example, passenger cars). Every vehicle a manufacturer produces and sells must be certified as falling within one of these categories. *See* Cal. Health & Safety Code §§ 43101, 43102 (West 1996). For example, to be certified as a LEV passenger car, a vehicle must emit no more than 3.4 grams per mile (g/mi) of carbon monoxide (CO) and .05 g/mi of NOx. Cal. Code Regs. tit. 13, § 1961(a)(1) (2003). A manufacturer must also ensure that the average emissions from the entire fleet of vehicles it sells do not exceed specified numerical "fleet average" standards for a given year. *See* Cal. Code Regs. tit. 13, § 1961(b)(1) (2003). Manufacturers have the flexibility to choose the mix of vehicles they produce, but as the yearly fleet averages become more stringent, manufacturers are forced to produce increasingly cleaner vehicles.

IV. THE PURPOSE AND DESIGN OF THE FLEET RULES.

In 1987 the California legislature granted the District the authority to require public and commercial fleets of fifteen or more vehicles operating in the South Coast to purchase vehicles powered by methanol or other "equivalently clean burning" alternative fuel (*e.g.*, natural gas, propane, or electric power). Cal. Health & Safety Code § 40447.5 (West 1996). The legislature enacted section 40447.5 after concluding that the South Coast would fail to meet its then applicable

1987 deadline for achieving the ozone NAAQS unless more aggressive action was taken to control pollution in the region. It stated:

> In recent months, the [District] has come under severe criticism from federal, state and local officials for not taking sufficient actions to control and reduce air pollution. These measures, and others currently pending in the Legislature, are intended to encourage more aggressive improvements in air quality and to give the district authority to implement such improvements.

Cal. Assem. Comm. On Natural Resources, Analysis of Sen. Bill No. 151 (1987-1988 Reg. Sess.) June 29, 1987, p. 4.

In 2000, the District adopted the six Fleet Rules that are the subject of this litigation. The Fleet Rules require tht purchasers operating public, and some private, fleets of fifteen or more covered vehicles buy cleaner vehicles from among those already certified by CARB as meeting California's standards. J.A. 17, 19-20 (1186.1), J.A. 24, 28-29 (1191), J.A. 46, 48-49 (1192), J.A. 52, 54-55 (1193), J.A. 58, 61-63 (1194), J.A. 66, 68-69 (1196). Four of the Fleet Rules require the purchase of only alternative fuel vehicles, J.A. 19-20 (1186.1), J.A. 48-49 (1192), J.A. 54-55 (1193), J.A. 68-69 (1196); two of the rules require fleet operators with certain light- and medium-duty fleets to choose either alternative fuel vehicles or cleaner vehicles certified for sale under California's LEV standards, J.A. 27 (1191), J.A. 61-63 (1194). All six Fleet Rules target vehicle fleets that operate in the South Coast and in close proximity to residential and commercial areas, including transit bus, refuse truck, and street sweeper fleets.

Because alternative fuel vehicles are less polluting than diesel vehicles, the District has estimated that the Fleet Rules will dramatically reduce pollution in the South Coast. Importantly, the Fleet Rules are intended to substantially

reduce particulate matter and the toxic risk faced by residents of the South Coast. *See, e.g.*, J.A. 83, J.A. 111.

Moreover, the Fleet Rules work hand in hand with California's established emission standards, requiring covered fleet operators to purchase vehicles only "as [they are] commercially available." J.A. 120. For example, under Rule 1191, fleet operators are required to purchase ULEVs only "when at least 50 percent of the vehicle sales of light- and medium-duty vehicles . . . are ARB certified as [ULEVs] or cleaner" to ensure commercial availability. J.A. 92, J.A. 27. Every one of the rules contains an exception that allows fleet operators to purchase a diesel or other noncompliant vehicle in the event that no certified compliant vehicle is commercially available for a particular application. J.A. 21 (1186.1(e)), J.A. 30 (1191(f)(8)), J.A. 50 (1192(e)(2)), J.A. 55 (1193(e)(3)), J.A. 63 (1194(e)(2)), J.A. 69 (1196(e)(1)(C)). As such, the Fleet Rules never require manufacturers to produce new motor vehicles. If no manufacturer produces a ULEV medium-duty vehicle or an alternative fuel truck or bus, for example, then no fleet operator is required to purchase one under the Fleet Rules.

V. THE PURPOSE AND DESIGN OF CLEAN VEHICLE PURCHASE INCENTIVE PROGRAMS.

The Fleet Rules are similar in purpose and effect to economic incentive programs that CARB and other regulators have long utilized in their struggle to attain clean air. Although states and local governments are prohibited under the Act from setting and enforcing "standards" for new motor vehicles, it is common for states to adopt incentive programs to ensure that the cleanest vehicles produced by manufacturers in accordance with already-established standards are purchased and operated within their borders. *See, e.g.*, Cal. Health & Safety Code, §§ 44243-44247, §§ 44275 *et seq.* (West 1996) (California Carl Moyer

Program and South Coast Mobile Source Air Pollution Reduction Review Committee both fund the incremental cost of cleaner vehicles); Ga. Code Ann. § 48-7-40.16 (2003) (Georgia tax credit for the purchase or lease of a zero-emission or low-emission vehicle); Kan. Stat. Ann. § 79-32,2001 (2002) (Kansas tax credit for the purchase of an alternative fuel vehicle); W.Va. Code §§ 11-6D-1—11-6D-8 (2003) (West Virginia tax credit for the purchase of or conversion to an alternative fuel vehicle).

One such example is the "Lower-Emission School Bus Program," which is an incentive program adopted by CARB in 2001 to "reduce [California] school children's exposure to both cancer-causing and smog-forming pollution" and "help in the effort to attain the state and federal [NAAQS] for PM." California Air Resources Board, Lower-Emission School Bus Program, at 3 (2001), *available at* http://www.arb.ca.gov/msprog/schoolbus/finalguide.doc. The program seeks to "introduce cleaner fuels" into school bus fleets by funding a minimum of 75% of the cost of cleaner school buses. *Id.* at 11, 15. Moreover, like Fleet Rules 1191 and 1194, this incentive program references CARB's standards as a convenient method to define which "cleaner" buses are eligible for funding. *Id.* at 13.

VI. THE DECISIONS BELOW UPHOLDING THE FLEET RULES.

Finding that the Fleet Rules are "purchase" rather than "production" requirements, the district court held that the rules "do not constitute unlawful standards 'relating to the control of emissions'" under section 209(a) of the Act. Pet. App. 24a. As the court explained:

> The Fleet Rules accept as given the existing CARB vehicle standards; they merely require fleet operators to choose from among the least polluting of CARB-certified, available vehicles. The Rules impose no new emission requirements on manufacturers whatsoever, and therefore do not run afoul of Congress's purpose behind motor vehicle preemption: namely, the protection of manufacturers against having to build engines in compliance with a multiplicity of standards.

Id. at 21a. The district court further held that the Fleet Rules do not set "standards" under section 209(a) because they do not impose any numerical pollution limits on new motor vehicles. *Id.*

The court also concluded that the clean-fuel vehicle purchase requirements in section 246 support a finding that the Fleet Rules are not preempted, stating: "It is not rational to conclude that the [Act] would authorize purchasing restrictions on the one hand, and prohibit them, as a prohibited adoption of a 'standard,' on the other." *Id.* at 23a. In its analysis the court also applied the presumption against preemption, holding that "[t]hroughout our history the several states have exercised their police powers to protect the health and safety of their citizens." *Id.* at 24a.

The district court dismissed the engine manufacturers' claim that the opt-in provisions of section 177 of the Act preempt the Fleet Rules because that section applies only to "states" wishing to "opt-in" to California's tougher emission standards. Pet. App. 25a. The court further found that the Fleet Rules do not undermine Congress's purpose in enacting section 177 because the rules do not require production of a so-called "third vehicle." *Id.* at 26a.

The court of appeals affirmed the decision of the district court "for the reasons stated in its well-reasoned opinion." Pet. App. 2a.

SUMMARY OF ARGUMENT

The Fleet Rules are not preempted by section 209(a), which prohibits the adoption or enforcement of "any standard relating to the control of emissions from new motor vehicles," because the Fleet Rules are not such "standards" within the meaning of the Act. "Standards" relating to motor vehicles are production mandates that establish the maximum quantity of a pollutant that may be emitted from the tailpipe of an individual motor vehicle before a manufacturer may introduce that vehicle into the stream of commerce. The Fleet Rules do not establish any such limits. Nor do they impose any obligation on manufacturers.

I. Although section 209(a) does not define the term "standard," Congress plainly meant that term to have the same meaning in section 209(a) (which preempts "state standards") as in section 202 (which requires EPA to adopt uniform federal "emission standards for new motor vehicles or new motor vehicle engines"). Section 209(a) was adopted and section 202 was reenacted contemporaneously as part of the National Emission Standards Act. Title II of Pub. L. 90-148, 81 Stat. 485 *et seq.* (1967). The weakness in the position of the engine manufacturers and the United States is most clearly illustrated by their failure to look to the Act itself to determine what Congress meant by a "standard relating to the control of emissions from new motor vehicles." They instead scour dictionaries in search of an overly broad definition of the term "standard," while ignoring the best guidance concerning Congress's meaning.

Section 202 makes clear that motor vehicle emission "standards" are production mandates that apply solely to manufacturers. In fact, while section 202 repeatedly uses the terms "manufacture," "manufacturer," or "manufactured," the term "purchaser" is not used once. Section 202 further makes clear that "standards" establish numeric limits on individual pollutants that may be emitted from the tailpipe of a new

motor vehicle, which "reflect the greatest degree of emission reduction achievable through the application of technology," section 202(a)(3)(A). For example, one provision in section 202(a)(3)(B)(ii) directs EPA to issue regulations governing NOx emissions from heavy-duty trucks produced after 1997 that "contain standards which provide that such emissions may not exceed 4.0 grams per brake horsepower hour (gbh)." Every other provision in section 202—and there are many—similarly establishes as a "standard" the baseline limit on the amount of a pollutant that may be emitted from the tailpipe of each new vehicle produced, expressed in "grams per brake horsepower hour" or something similar.

Section 203 of the Act further makes clear that the "standards" established in section 202 are prerequisites with which manufacturers must comply before they may introduce a new motor vehicle into commerce anywhere in the United States. Section 203 explicitly prohibits "the sale, or the offering for sale, or the introduction, or delivery for introduction, into commerce" by a manufacturer of a vehicle that fails to comply with the applicable federal standard, but notably, not the purchase of such a vehicle.

Unlike the "standards" established by section 202, the Fleet Rules do not establish or impose on manufacturers numeric production mandates. The Fleet Rules require only that purchasers operating fleets of fifteen or more vehicles buy cleaner vehicles from among those already certified as complying with the relevant emission standards. The Fleet Rules also do not regulate or require the production of motor vehicles, nor must a manufacturer comply with the Fleet Rules before introducing a vehicle into the stream of commerce. To the contrary, none of the Fleet Rules requires a fleet operator to purchase an alternative fuel or other compliant vehicle if one is not already "commercially available" for a particular application. Accordingly, the Fleet Rules do not prevent manufacturers from continuing to

produce any mix of vehicles they choose—the rules merely provide a ready market for cleaner vehicles, and thus, an incentive for individual manufacturers to produce them.

In the parlance of the Act, the Fleet Rules are "requirements" rather than "standards." Three different provisions in the Act draw that distinction—sections 116, 209(e), and 246—and the D.C. Circuit has recognized that Congress clearly distinguished between "standards" and "requirements" in the Act. *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1093 (D.C. Cir. 1996).

Consideration of section 246 confirms that the Fleet Rules are not preempted "standards" under section 209(a). That provision requires specified nonattainment areas to adopt fleet purchase rules for certain vehicles. If Congress had thought that fleet rules would otherwise be preempted by section 209(a), it would have included the phrase "notwithstanding section 209(a)" in section 246—as it did elsewhere in the Act, including in section 177, which authorizes other states to adopt California's emissions standards "notwithstanding section 209(a)." Congress added no such clause to section 246. Rather, as the district court concluded, Congress thought that fleet rules were entirely consistent with the Act—that is why Congress *mandated* the adoption of fleet rules in certain circumstances.

The presumption against preemption also counsels against adoption of the overly broad reading of "standards" advanced by the engine manufacturers. This Court stated in 1960 that "the problem of air pollution is peculiarly a matter of state and local concern." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 445-46 (1960). Most states had air quality regulations in place before Congress enacted the Act, and many had laws focusing narrowly on pollution caused by motor vehicle emissions. Therefore, this is a field of traditional state concern, and the presumption that Congress

did not intend to preempt applies. That is reinforced by the savings clause in section 116, which makes clear that Congress did not intend to broadly preempt state and local efforts to reduce air pollution.

II. Consideration of the purposes of the Act and section 209(a) further confirms that the Fleet Rules are not "standards." The Clean Air Act, of course, is intended to promote public health by reducing air pollution. Because motor vehicles are the dominant source of smog and cancer risk from air pollution in the South Coast, the Fleet Rules aim to substantially reduce this pollution by bringing cleaner vehicles to the region. Moreover, the Act makes clear in section 101(a)(3) that "air pollution control at its source is the primary responsibility of States and local governments." The South Coast has the worst air quality in the nation and needs aggressive measures such as the Fleet Rules to attain compliance with its looming clean air deadlines. It is undisputed that the Fleet Rules thus advance the purposes of the Act.

The Fleet Rules are in no way inconsistent with Congress's purpose in enacting section 209(a). As the legislative history makes clear, section 209(a) is intended to prevent states from requiring manufacturers to produce "a 'third vehicle'"—that is, a vehicle that must satisfy emission standards different than those established by federal or California rules. The Fleet Rules do not require the production of a "third vehicle." Rather, they only require certain fleet operators to purchase vehicles from among those already certified for sale in California. Like incentive programs promoting the purchase of cleaner vehicles that the United States acknowledges are in compliance with the Act, the Fleet Rules are not preempted.

ARGUMENT

I. CONGRESS DID NOT INTEND TO PREEMPT STATE AND LOCAL VEHICLE PURCHASE REQUIREMENTS SUCH AS THE DISTRICT'S FLEET RULES.

This Court has repeatedly emphasized the "cardinal rule" of statutory construction "that a statute is to be read as whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citation omitted); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"). "As Judge Learned Hand so eloquently noted: 'Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.'" *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 25 n.6 (1988) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941)).

Although the engine manufacturers suggest otherwise, Pet. Br. 21, this basic tenet of statutory construction applies to an express preemption provision. In *Iowa Dep't of Revenue*, 488 U.S. at 24-25, for example, as part of its analysis of the scope of an express preemption clause, this Court emphasized that "the meaning of the words depends on their context." Similarly, in *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-64 (2002), on which the engine manufacturers rely, this Court considered the statutory context to find that an express clause prohibiting the application of a state or local "law or regulation" did not extend to common law tort claims.

It is particularly important to consider the context in which a term is used where the term at issue "can have more than

one meaning." *See, e.g., Whitman v. American Trucking Ass'n*, 531 U.S. 457, 466 (2001). That is the case here, where the engine manufacturers and the United States proffer broad definitions of the term "standard" culled from selected dictionary definitions and Respondents urge a more precise meaning based on the context of the Act. As we discuss below, examining the term "standards" in the context of the motor vehicle provisions of the Act shows that Congress intended "standards" in section 209(a) to mean numeric production mandates imposed on manufacturers.

A. Under The Clean Air Act, A "Standard" Is A Numerical Production Mandate Imposed On Manufacturers.

This Court has held that "[t]he interrelationship and close proximity of . . . provisions of . . . [a] statute 'presents a classic case for application of the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning."'" *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2155 (2003) (quoting *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996)). Section 209 is an integral part of the motor vehicle provisions of the Act, sections 202-209, 214-219, which set forth the Act's comprehensive scheme for the setting and enforcement of uniform, federal emission "standards." How the term "standard" is used in this broader scheme should inform this Court's interpretation of that same term in section 209(a).[3]

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[3] As an initial matter, the plain language of section 209(a), by itself, demonstrates that the term "standards" cannot include *all* regulations "relating to the control of emissions from new motor vehicles," as the engine manufacturers claim, Pet. Br. 23. If "standards" were that broad, then the second sentence of section 209(a) (which the engine manufacturers concede does not apply to the District, Pet. Br. 28) prohibiting a State from adopting certification, inspection, and other such approvals "relating to the control of emissions from any new motor vehicle" would be rendered superfluous.

1. *Section 202 makes clear that a "standard" imposes a numerical tailpipe limit on a manufacturer.* Section 202 of the Act, entitled "[e]mission standards for new motor vehicles or new motor vehicle engines," governs the adoption of federal emission "standards" by EPA. As the court in *American Automobile Mfrs. Ass'n v. Commissioner* found, both the text and the legislative history of the Act confirm that "it is unlikely that Congress intended the term 'standards' to have a different meaning when referring to state standards as compared with federal standards." 998 F.Supp. 10, 22 (D. Mass.), *aff'd*, 208 F.3d 1 (1st Cir. 1997). Further, section 209(b) allows a waiver of the preemption provision for California only if "the state standards will be at least as protective of public health and welfare as applicable federal standards." Clearly Congress intended that state and federal "standards" must refer to the same types of regulations, or this provision would have no meaning.

Emission standards under section 202 are established on a pollutant-by-pollutant basis for each "class" of motor vehicle, as defined by the vehicle's model year, weight, horsepower, or other relevant factors. Such emission standards are different from the purchase requirements of the Fleet Rules in three critical respects.

First, "standards" under section 202 are production mandates that apply solely to manufacturers. Section 202 consistently defines standards as applying to the manufacture of motor vehicles. *See, e.g.*, 42 U.S.C. § 7521(b)(1)(A) ("[R]egulations . . . applicable to emissions of carbon monoxide and hydrocarbons from light-duty vehicles and engines *manufactured* during model years 1977 through 1979 shall contain standards . . . [R]egulations . . . applicable to emissions of hydrocarbons from light-duty vehicles and engines *manufactured* during or after model year 1980 shall contain standards") (emphasis added). Standards apply by "model year," which is defined in section 202(b)(3)(A)(i) as

"the *manufacturer's* annual production period" (emphasis added). Further, the burden of compliance with "standards" falls squarely on manufacturers. For example, section 202(b)(1)(B)(i) allows EPA to impose an alternative standard where "the ability of [a] manufacturer to meet emission standards . . . was, and is, primarily dependent upon technology developed by other manufacturers" and other factors are met.[4] The remaining provisions of section 202 all are aimed at manufacturers. Notably, not one applies to purchasers of new motor vehicles.

Second, the term "standard" is used in section 202 solely in reference to numerical limits on tailpipe emissions. For example, section 202(a)(3)(B)(ii) provides that "[e]ffective for the model year 1998 and thereafter, the [EPA] regulations . . . applicable to emissions of oxides of nitrogen (NOx) from gasoline and diesel-fueled heavy duty trucks shall contain standards which provide that such emissions may not exceed 4.0 grams per brake horsepower hour (gbh)." Similarly, section 202(b)(1)(A) states that the "regulations . . . applicable to emissions of carbon monoxide and hydrocarbons from light-duty vehicles and engines manufactured during model years 1977 through 1979 shall contain standards which provide that such emissions . . . may not exceed 1.5 grams per vehicle mile . . . and 15.0 grams per vehicle mile," respectively. *See also, e.g.*, 42 U.S.C. § 7521(b)(1)(A), (B). Moreover, section 202(b)(1)(C) explicitly refers to the "numerical emission standards specified" in other subsections of 202.

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[4] *See also, e.g.*, 42 U.S.C. § 7521(b)(3) ("[u]pon the petition of any manufacturer" EPA "may waive the standard . . . for any class or category of light-duty vehicles or engines manufactured by such manufacturer"); 42 U.S.C. § 7521(b)(1)(A), (B) ("assuring that vehicles and engines manufactured before the beginning of a model year were not manufactured for the purposes of circumventing the effective date of a standard").

As the D.C. Circuit has correctly concluded, "the word 'standards' connotes a numerical value setting the quantitative level of permitted emissions of pollutants by a new motor vehicle." *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1093. In fact, in so holding, the court adopted *EPA's* interpretation of standards as numerical limits on tailpipe emissions. *Id.* The court rejected the industry's argument "that a 'standard' refers to any criterion with which the manufacturers must comply." *Id.* at 1112. The D.C. Circuit also found that the legislative history supported this interpretation: "The Senate Report on the Air Quality Act of 1967 [Clean Air Act], discussing the preemption provision, mentions 'standards' for hydrocarbons, nitrogen oxides, and carbon monoxide in obvious reference to the numerical limitations on those pollutants." *Id.* (citing S. Rep. No. 90-403 at 32 (1967); H.R. Rep. No. 95-294 at 302 (1977)).[5]

The United States relies on section 202(g) to argue that "standards" are not limited to quantitative tailpipe emissions because that section requires EPA to adopt standards that "phase[] in new emissions criteria." U.S. Br. 15 n.3. But the "emissions criteria" referenced in 202(g) unmistakably are numerical tailpipe emission limitations for individual vehicles. Table G in 202(g), entitled "Emission Standards For NMHC [non-methane hydrocarbons], CO [carbon monoxide], and NOx" from light-duty cars and trucks, sets forth these numerical tailpipe emission limitations in grams per mile. Further, section 202(b)(1)(C) explicitly refers to the "numerical emission standards specified in subsection[] . . . (g)." The fact that section 202(g) directs EPA to phase in these new emission standards over three years merely

[5] As the United States notes, U.S. Br. 14, the D.C. Circuit also concluded that section 302(k)'s definition of "emissions standards," 42 U.S.C. § 7602(k), relates only to "stationary sources," *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1112 n.35.

reinforces the fact that a "standard" places a production burden on manufacturers.

Third, a "standard" under section 202 sets a *new*, baseline level of emissions that manufacturers must meet, instead of merely referencing existing limits as do the Fleet Rules. In fact, under section 202(a)(2), a standard does not take effect until "after such period as the Administrator finds necessary to permit the development and application of the requisite technology" to meet it.

2. *Sections 203, 206, and 216 confirm that a "standard" establishes a production requirement with which manufacturers must comply before distributing a new motor vehicle.* Together with section 202, sections 203, 206, and 216 establish that the Act's scheme for the setting and enforcing of "emission standards" for "new motor vehicles" places the burden of compliance solely and squarely on *manufacturers*, not purchasers. Initially, a "new motor vehicle" is defined under section 216(3) as "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser." 42 U.S.C. § 7550(3). Moreover, section 203(a)(1) of the Act ("prohibited acts") prohibits a manufacturer from "the sale, or the offering for sale, or the introduction, or delivery for introduction, into commerce" of a new motor vehicle unless it is covered by "a certificate of conformity." A manufacturer may receive such a "certificate of conformity" for a new motor vehicle or engine only after EPA tests it to ensure it meets the applicable federal standards set forth in section 202. 42 U.S.C. § 7525(a)(1). Thus, sections 203 and 206 enforce federal "standards" by prohibiting manufacturers from selling any new motor vehicle that does not meet those standards. Notably, neither sections 203 and 206, nor any other section of the motor vehicle provisions of the Act, regulate the *purchase* of new motor vehicles.

3. *In section 209(a), Congress preempted "standards," not "requirements."* As the D.C. Circuit has found, Congress

purposefully distinguished between "standards" and "requirements" in section 209. *Engine Mfrs. Ass'n*, 88 F.3d at 1093. Specifically, while section 209(a) exempts only "standards," section 209(e)—addressing pollution from "nonroad vehicles"—preempts "any *standard or other requirement* relating to the control of emissions" (emphasis added). Likewise, section 246 of the Act—which mandates fleet purchase requirements for certain nonattainment areas—also distinguishes between "standards" and "requirements." Section 246(b) describes the percentage of all new covered fleet vehicles that must be purchased by fleet operators in a given year as the "clean fuel vehicle phase-in *requirements* for fleets" (emphasis added). By contrast, section 246(c) refers to "the *standards* applicable under section 7583" (emphasis added), in obvious reference to the numerical limits on tailpipe emissions that define a "clean-fuel vehicle," such as the light-duty truck "standards" of 3.4 gpm of CO and 0.2 gpm of NOx, 42 U.S.C. § 7583(a)(2).

Similarly, in section 116 Congress separately preserves state and local authority to adopt "(1) any standard or limitation" and "(2) any requirement." Because section 209(a) preempts only "standards" relating to the control of motor vehicle emissions, section 116 preserves the ability of state and local governments to adopt "any requirement" relating to the control of emissions.[6]

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[6] The second sentence of section 209(a) also prohibits a "State" from imposing a narrow list of requirements, including certification, inspection or other similar approvals as a condition precedent to the initial retail sale, titling or registration of a new motor vehicle. The engine manufacturers concede that this provision does not apply to the District, because it applies solely to "States." Pet. Br. 28. But in any event, as the engine manufacturers also correctly state, this provision plainly is intended to prevent states from circumventing the prohibition on "standards" in the first sentence of 209(a) by "designing tests and certification and other approval procedures that would have undermined or changed" the federal

4. *Neither the engine manufacturers nor the United States has articulated a plausible alternative definition of the term "standard."* Both the engine manufacturers and the United States rely on a multitude of generic and mostly irrelevant dictionary and other definitions of the word "standard." The United States, for example, quotes from the Black's Law Dictionary's definition of "standard" as a "measure or rule applicable in legal cases such as the 'standard of care' in tort actions." U.S. Br. 14. The engine manufacturers and the United States make a jump from these definitions to conclude that the meaning of "standard" is so broad that it must encompass purchase requirements. Further, both use words gleaned from these definitions, rather then the words of section 209(a) itself and the motor vehicle provisions of the Act, to make unsubstantiated claims throughout their briefs that the Fleet Rules are preempted because they are based on "emissions characteristics," Pet. Br. 25, or set "emission-related criteria," U.S. Br. 12, "emission control requirements," *id.* at 21, or "regulatory requirements," *id.* at 25.

In so doing, they ignore the well-established jurisprudence of this Court that, where a term has more than one possible meaning, courts must look to the context in which it is found. *See, e.g., Whitman*, 531 U.S. at 466. The United States purports to acknowledge that the meaning of the word "standard" in the Act must "conform[] to the structure and purpose of the provision in which it is used." U.S. Br. 14. Yet inexplicably, it presents only plainly irrelevant uses of the word "standard" in the Act, while conspicuously avoiding the use of "standard" in the context of the *motor vehicle emission provisions* of the Act.

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or California standards. Pet. [illegible]. 29. As discussed below, the Fleet Rules do not contain any such approval procedures, and instead, require the purchase of vehicles already tested and certified by CARB as meeting CARB's standards.

The engine manufacturers and the United States instead primarily focus on words in section 209(a) other than "standards," including "relating to" and "any," in an effort to expand the meaning of the term "standards" unreasonably. First, both mistakenly rely on cases defining the scope of preemption under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a), and the Airline Deregulation Act ("ADA"), *formally at* 49 U.S.C. app. § 1305(a)(1), to claim that the phrase "relating to" in section 209(a) somehow broadens the scope of preemption beyond "standards." But while Congress expressly limited section 209(a) preemption to "standards," the cases cited by the engine manufacturers and the United States involved preemption language under ERISA and the ADA that more expansively prohibit "any and all state laws" and "any law, rule, regulation, standard, or other provision," respectively, that "relate to" the preempted subject matter. *See Egelhoff v. Egelhoff*, 532 U.S. 141, 146 (2001) (ERISA); *California Division of Labor Standards Enforcement v. Dillingham Const., N.A.*, 519 U.S. 316, 335 (1997) (ERISA); *American Airlines v. Wolens*, 513 U.S. 219, 234-35 (1995) (ADA); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (ERISA); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 127-28 (1992) (ERISA); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (ADA).[7]

In all but one of the cases cited by the engine manufacturers and the United States, there was no question that the regulation at issue was a "state law" or a "law, rule,

[7] Petitioners also cite to *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996), which analyzed the McCarran-Ferguson Act's "special . . . anti-preemption provision" providing that "No act of Congress shall be construed to invalidate, impair, or supersede *any law enacted by any State* for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b) (emphasis added).

regulation, standard, or other provision." Only in *Wolens* did this Court focus on whether the asserted claims for breach of contract constituted enactment or enforcement of a "law, rule, regulation, standard, or other provision having the force and effect of law" under the ADA. *Wolens*, 513 U.S. at 226-29. The Court held that these claims were not preempted because they enforced "privately ordered obligations," and thus did not fall within the scope of preemption. *Id.* at 228-29. Notably, because the Court reached this conclusion, it did not consider whether the claims "relat[ed] to . . . rates, routes, or services." *Id.* at 226. The Court's inquiry here similarly should begin and end with the conclusion that the Fleet Rules are not "standards" under section 209(a). The words "relating to" do not expand the scope of preemption beyond "standards"; they merely define what type of "standards" Congress intended to preempt, that is, those "relating to the control of emissions from new motor vehicles."

The engine manufacturers (but not the United States) next misstate the holdings of several cases to claim that the Court has "interpret[ed] Congress's use of the word 'any' to indicate that there was 'no limitation, apart from that of reasonableness,' upon [the] *statute's* applicability." Pet. Br. 24 (emphasis added). As illustrated by the very cases they rely on, however, "any" is a term used solely to qualify what follows. *See United States v. James*, 478 U.S. 597, 604-05 (1986) (Congress's use of the words "any" damages and "liability of any kind" in immunity provision demonstrated that United States was protected from personal, as well as property, damage claims); *Shea v. Vialpando*, 416 U.S. 251, 260 (1974) (where the term "expenses" was unambiguous, the phrase "any expense" could be interpreted as "no limitation, apart from that of reasonableness, may be placed upon the recognition *of expenses*") (emphasis added); *see also Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 586, 588-89 (1980) (the phrase "any other final action" was not limited to

final actions similar to those enumerated in the preceding provisions of the statute, as respondents had argued). Thus, while section 209(a) does indeed preempt "any" standard relating to the control of emissions from new motor vehicles, this Court must first find that the Fleet Rules establish such a "standard." The Fleet Rules do not.

B. The Fleet Rules Are Not "Standards" Under Section 209(a).

The Fleet Rules do not set "standard[s] relating to the control of emissions from new motor vehicles" as that phrase is used in the motor vehicle provisions of the Act. First, the Fleet Rules do not impose a production mandate—or any obligations—on manufacturers. In California, it is CARB that adopts and enforces new motor vehicle emission "standards" pursuant to its authority under section 209(b) of the Act. Cal. Health & Safety Code § 43804 (West 1996). Manufacturers must comply with CARB's standards, not the Fleet Rules, before they can make a vehicle available for sale in the state. If a manufacturer wishes to sell a passenger vehicle in California and call it a "low-emission vehicle," for example, under CARB's LEV standards, the manufacturer must build that vehicle to emit no more than 3.4 g/mi of CO and .05 g/mi of smog-forming NOx. Cal. Code Regs. tit. 13, § 1961(a)(1) (2003). Moreover, it is the "fleet average" requirements established by CARB—which become increasingly stringent over time—that will require manufacturers to produce a greater number of ULEVs and SULEVs in the future.

By contrast, the purchase requirements of the Fleet Rules are triggered by the commercial availability of CARB-certified motor vehicles. Under Rule 1191, for example, public fleet operators will be required to purchase ULEVs only "when at least 50 percent of the vehicle sales of light- and medium-duty vehicles . . . are ARB certified as [ULEVs]

or cleaner." J.A. 92. In fact, all six Fleet Rules contain an exception that allows a purchaser to buy a diesel (or other noncompliant) vehicle in the event no compliant vehicle is "commercially available" for a particular application. J.A. 21 (1186.1(e)), J.A. 30 (1191(f)(8)), J.A. 50 (1192(e)(2)), J.A. 55 (1193(e)(3)), J.A. 63 (1194(e)(2)), J.A. 69 (1196(e)). As such, the Fleet Rules work in complete harmony with CARB's standards. Manufacturers remain free to produce any mix of vehicles they choose in compliance with CARB's standards, and fleet operators subject to the Fleet Rules are required only to purchase the cleanest vehicles that are commercially available.

Further, as the district court correctly held, the Fleet Rules do not "impos[e] any numerical control on new vehicles" before they are distributed by manufacturers. Pet. App. 21a. Four of the Fleet Rules define cleaner vehicles only by reference to the type of fuel they use (requiring the purchase of vehicles that run on an alternative fuel, such as natural gas), rather than by a numerical emission limitation expressed in grams per brake horsepower hour, or something similar; two of the rules define cleaner vehicles solely by reference to their fuel type or the standards already established and enforced by CARB. *See* Statement, section IV, *supra*. Rule 1194, for example, provides that "all new purchases or leases of passenger cars or medium-duty vehicles used to pick up passengers at commercial airport terminals shall be a vehicle that has been certified by CARB that meets the ULEV, SULEV, or ZEV emission standards." J.A. 61. As such, these rules do not "adopt" or "enforce" any standards, but rather, like many incentive programs, they merely define cleaner vehicles by reference to CARB's established standards.

C. Section 246 of the Act, Which Mandates Fleet Rules In Certain Circumstances, Further Confirms That "Standards" Under Section 209(a) Do Not Include Fleet Purchase Requirements.

Congress's addition of section 246 to the Act in 1990 further buttresses the conclusion that "standard[s] relating to the control of emissions from new motor vehicles" in section 209(a) do not include clean-fuel vehicle purchase requirements such as the Fleet Rules. Section 246 requires states containing certain nonattainment areas for ozone or carbon monoxide to adopt a "clean-fuel vehicle program," which—like the Fleet Rules—requires certain fleet operators to purchase "clean-fuel vehicles" in specified years. Specifically, a clean-fuel vehicle program under section 246(b) must "contain provisions requiring that at least a specified percentage of all new covered fleet vehicles in model year 1998 and thereafter purchased by each covered fleet operator in each covered area shall be clean-fuel vehicles and shall use clean alternative fuels when operating in the covered area." Similar to the Fleet Rules, fleet operators are free to choose from among available compliant "clean-fuel vehicles" under section 246(d).

The courts below correctly found that Congress's adoption of section 246 makes clear that fleet purchase requirements are not emission "standards" under section 209(a). As the district court explained: "It is not rational to conclude that the [Act] would authorize purchasing restrictions on the one hand, and prohibit them, as a prohibited adoption of a 'standard,' on the other." Pet. App. 23a.

Congress's intention to exclude fleet purchase requirements from the definition of prohibited "standards" under section 209(a) is evident from its failure to provide in section 246 that fleet purchase requirements mandated by that section

are an exception to 209(a) preemption. By contrast, Congress explicitly provided in sections 209(b) and 177 that it was authorizing states to adopt regulations that would otherwise be preempted by section 209(a). In section 209(b), Congress authorized EPA to "waive application of this section" to allow California to adopt its own emission standards. And in section 177, Congress gave other states the right to adopt California's tougher emission standards "notwithstanding section 7543(a) [209(a)] of this title."

Had Congress thought fleet purchase requirements other than those mandated under section 246 were preempted by section 209(a), it would have added the language "notwithstanding section 209(a)" to the beginning of section 246. It did not. The logical conclusion, therefore, is that Congress did not consider clean-fuel vehicle purchase requirements, such as those set out in section 246 and in the Fleet Rules, to be emission "standards" preempted under section 209(a). *See Desert Palace, Inc.*, 123 S. Ct. at 2154 (finding that Congress's failure to define the word "demonstrates" in Title VII to require a heightened burden of proof was significant, as Congress has been "unequivocal" when imposing heightened burdens of proof in other circumstances). In fact, when Congress enacted section 246 in 1990, it recognized that the California Legislature had just three years earlier authorized the District to adopt fleet rules, stating that "California would be proceeding along its own path, perceived at this time as mandating similar fleet requirements." H.R. Rep. No. 101-490, pt. 1, at 177 (1990). Plainly, Congress did not intend to preempt those rules.

The United States argues that Congress's adoption of section 246 shows that it "did not believe that States were already free to regulate emissions from vehicle fleets however they chose." U.S. Br. 26-27. But section 246 does not *authorize* states to adopt fleet rules; it *requires* states to adopt fleet rules in certain specified circumstances. The engine

manufacturers contend that the Fleet Rules are not "saved" by section 246, because the rules do not comply with the requirements of that section. Pet. Br. 42-44. But Respondents have never argued that the District adopted the Fleet Rules pursuant to section 246.[8] Rather, we argue that the Fleet Rules are not preempted "standards" under the Act, and thus, do not need to be "saved" by any other provision.[9]

Section 246 therefore confirms that Congress did not view purchase requirements as "standards" that would be preempted by section 209(a), instead viewing them as entirely consistent with the purposes of the Act. In fact, Congress added section 246 to the Act out of an explicit recognition that many cities would not meet the national ambient air quality standards without adopting aggressive measures, such as requiring the use of clean fuels in motor vehicles. *See* Sen. Comm. On Public Works, 103d Cong., 1st Sess., A Legislative History of the Clean Air Act Amendments of 1990, Serial No. 103-38, at 2572-2573 (1993) (statement of Rep. Waxman). Likewise, the Fleet Rules are an essential component of the District's strategy to address its overwhelming regional air pollution problem.

D. The Savings Clause And The Presumption Against Preemption Support The Conclusion That The Fleet Rules Are Not Preempted.

The Act's savings clause (section 116) and the general presumption against preemption further confirm that section

[8] There are several differences between section 246 and the Fleet Rules. The most significant difference is that section 246 defines "clean-fuel" vehicles by applying numerical emissions standards, whereas the Fleet Rules define clean fuel vehicles according to the fuel they use.

[9] The engine manufacturers also argue that the Fleet Rules are not saved by section 209(b) or section 177. Pet. Br. 36-42. As with section 246, the engine manufacturers are responding to straw men rather than to arguments made by Respondents.

209(a)'s preemption of "standards" should be read narrowly to preempt only the adoption or enforcement of numeric production mandates placed on manufacturers.

1. In section 116, Congress retained for states and local governments broad authority to prevent and control air pollution. Aside from three very narrowly tailored limitations set forth in section 116—two of which the engine manufacturers agree are not at issue here—Congress provided that "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." This savings clause makes clear Congress's intent not to preempt broadly, especially in light of the fact that section 209(a) only preempts "standards," not "requirements." *See, e.g., Sprietsma*, 537 U.S. at 63.

2. In addition, as this Court has consistently held, a preemption analysis starts "with the assumption that the historic police powers of the State were not to be superseded by the Federal Act 'unless that was the clear and manifest purpose of Congress.'" *City of Columbus v. Ours Garage & Wrecker Serv., Inc.* 536 U.S. 424, 438 (2002) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996)). As the parties asserting preemption, the engine manufacturers "bear the considerable burden of overcoming 'the starting presumption that Congress does not intend to supplant state law.'" *De Buono v. NYSA-ILA Med. and Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (quoting *Travelers Ins. Co.*, 514 U.S. at 654).

Contrary to the engine manufacturers' contention, Pet. Br. 21, the presumption against preemption applies to the question of the scope of preemption under an express preemption provision. *Medtronic Inc.*, 518 U.S. at 485; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992);

De Buono, 520 U.S. at 814; *see also Rush Prudential HMO, Inc., v. Moran*, 536 U.S. 355, 365 (2002) (presumption against preemption helps clarify congressional intent when there is an express preemption provision and a strong savings clause); *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001) (presumption applies to determination of scope of ERISA's express preemption provision).

Further, while it is correct that the presumption against preemption applies only where a field has been traditionally occupied by the states, *United States v. Locke*, 529 U.S. 89, 108 (2000), the field of air quality regulation is precisely such a field. In contrast to the field of national and international maritime commerce considered by this Court in *Locke*, where there was a history of "significant federal presence," *see Locke*, 529 U.S. at 108 ("Congress [] legislated in the field from the earliest days of the Republic"), by the time of adoption of the Act in 1963, forty states had adopted air pollution control regulations. *See* Statement, section II, *supra*. Further, by 1963, seven states and the District of Columbia had adopted legislation specifically addressing motor vehicle emissions. *Id.*

By contrast, Congress granted only limited powers to federal authorities when it first adopted the Act, allowing them to intervene to abate interstate pollution in specified circumstances. *Train v. NRDC*, 421 U.S. at 63-64; Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392. While later amendments broadened the role of the federal government in the control of motor vehicle emissions, Congress continuously has emphasized that the primary responsibility for formulating air pollution control strategies rests with the states. *Train*, 421 U.S. at 64; *Union Elec. Co.*, 427 U.S. at 256. As the Congressional Findings set forth in section 101(a)(3) provide: "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments."

E. Section 177 Does Not Expand The Scope Of Preemption Under Section 209(a).

There is no support for the engine manufacturers' argument that in 1990 Congress expanded the scope of preemption under section 209(a) to preempt "indirect" prohibitions on the sale of a new motor vehicle by adding a sentence to section 177 that clarifies that "[n]othing in this section or in subchapter II of this chapter shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle." *See* Pet. Br. 30. If Congress intended section 209(a) to preempt every regulation that would even indirectly limit the sale of any new motor vehicle, then it would have stated so explicitly in section 209(a) itself, not in an ancillary provision like section 177. As this Court has said in the context of the Act, "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman*, 531 U.S. at 468.

Further, the legislative history confirms that this 1990 amendment was added as "a mere clarification of current law *and was not intended to provide any preemption of State authority under section 177*." Sen. Comm. on Public Works, 103rd Cong., 1st Sess., A Legislative History of the Clean Air Amendments of 1990, Serial No. 103-38, at 790 (1993) (exhibit 1 submitted by Sen. Mitchell) (emphasis added).

It is clear that Congress had a narrower purpose in mind in adding this language to section 177. The Act recognizes that states could impose stricter standards by procedural rather than substantive means. That is why the second sentence of section 209(a) provides that states may not "require certification, inspection, or any other approval . . . as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle"—so states cannot enforce

prohibited state "standards" through a "backdoor" certification or inspection requirement. The indirect prohibition language in section 177 similarly clarifies that while states may adopt the California emissions standards, they may not enforce the standards through different testing and certification methods in a manner that would require manufacturers to create a "third vehicle" to sell in that state. *See* Sen. Comm. On Public Works, 103d Cong., 1st Sess., A Legislative History of the Clean Air Act Amendments of 1990, Serial No. 103-38, at 790 (1993) (exhibit 1 submitted by Sen. Mitchell) (States must enforce California emission standards "consistent with California protocols and testing [] to assure that the California cars meet California's standards when operated in the opt-in State").

That is precisely why this sentence in section 177 applies only to "any such State," meaning any state choosing to opt in to California's standards. The engine manufacturers' effort to expand the phrase "any such State" to include a "political subdivision" and to use this clause to modify the scope of preemption under section 209(a) should be rejected.

II. THE FLEET RULES ADVANCE THE PURPOSES OF THE CLEAN AIR ACT AND DO NOT REQUIRE MANUFACTURERS TO PRODUCE A "THIRD VEHICLE."

Because a preemption challenge turns on congressional purpose, as part of its preemption analysis this Court has consistently examined the purpose of the statute in which the preemption provision appears. *See Sprietsma*, 537 U.S. at 70 (finding no preemption where Congress's concern with uniformity in boat manufacturing, reflected by an express preemption provision, was outweighed by the statute's objective of promoting boating safety); *Medtronic, Inc.*, 518 U.S. at 486-90; *Travelers Ins. Co.*, 514 U.S. at 656.

A finding that the Fleet Rules are preempted by section 209(a) would turn the Act on its head by frustrating the ability of states and local air districts to respond effectively to their localized air quality problems, while not furthering the intent of section 209(a) to protect manufacturers from the burden of producing a so-called "third vehicle."

A. Preempting The Fleet Rules Would Frustrate Congress's Intent That States And Local Governments Reduce Air Pollution.

The purpose of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). To achieve this purpose, Congress repeatedly has made clear in the Act that the "primary responsibility" for reducing air pollution and achieving federal air quality standards rests with States and the local air quality agencies. 42 U.S.C. § 7401 (congressional finding that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments"); *see also* Statement, section II, *supra*.

Congress's emphasis on state and local regulation under the Act is a matter of "practical necessity," as "corrective remedies for air pollution . . . necessarily must be considered in the context of localized situations." *Washington v. General Motor Corp.*, 406 U.S. 109, 115-16 (1972). As the Court has explained, "measures which might be adequate to deal with pollution in a city such as San Francisco, might be grossly inadequate in a city such as Phoenix, where geographical and meteorological conditions trap aerosols and particulates." [10]

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[10] The engine manufacturers correctly note that *Washington* contains a general statement that "Congress has largely preempted the field with regard to 'emissions from new motor vehicles.'" Pet. Br. 22. But *Washington* did not concern the scope of section 209(a), and this

Id. Congress recognized as early as 1967 that Los Angeles stands alone as having "unique problems" that led to especially severe smog conditions. H.R. Rep. No. 90-728, at 22 (1967); 113 Cong. Rec. 30945-46 (1967).

A finding that the Fleet Rules are preempted would frustrate Congress's clearly expressed purpose by hindering the ability of the District—and other districts and states around the country—to reduce regional pollution and meet federal air quality standards. *See Exxon Mobil Corporation v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000) (state requirement for increased oxygen levels in fuel not preempted under Clean Air Act because increased oxygen levels could be needed to meet the NAAQS, a "core purpose of the Act"). It was precisely out of a need to dramatically reduce pollution in the South Coast region that the California legislature in 1987 enacted Cal. Health & Safety Code § 40447.5 (West 1996) authorizing the District to adopt fleet rules. *See* Cal. Assem. Comm. On Natural Resources, Analysis of Sen. Bill No. 151 (1987-1988 Reg. Sess.) June 29, 1987, p. 4. Without the Fleet Rules, the South Coast region was not expected to come into compliance with federal NAAQS for ozone for "several decades." *Id.*

Unfortunately, the region is still in "extreme" nonattainment for ozone, with only seven years remaining before the deadline for attainment of the NAAQS. *See* Statement, section I, *supra*. And the South Coast remains in "serious" nonattainment for particulate matter, with only three years

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statement was merely *dicta*. *Washington*, 406 U.S. at 114. The only issue in *Washington* was whether the Court should exercise its original jurisdiction over a case brought by 18 states against major automobile manufacturers alleging a conspiracy to restrain the development of pollution control equipment. *Id.* at 111. In declining to take jurisdiction, the Court held that air pollution prevention requires local solutions. *Id.* at 116. As such, *Washington* actually supports the decisions of the courts below to apply the presumption against preemption in this case.

remaining under that looming 2006 deadline. *Id.* Given that the majority of air pollution comes from mobile sources, J.A. 80, the engine manufacturers' reading of the Act would render the District powerless to achieve these standards on time, to the detriment of the health of the residents of the South Coast. Moreover, as discussed below, the engine manufacturers' broad reading could preempt a wide range of traditional state and local pollution control programs, such as incentive funding programs, needed by States and local regions to carry out the Act's mandate. These programs generally, and the Fleet Rules in particular, respond to the very serious health problems posed by air pollution.[11]

EPA recently determined that long-term exposure to diesel exhaust poses a lung cancer hazard; the California Air Resources Board listed diesel exhaust particulate as a "toxic air contaminant;" and the District concluded that "70% of all [cancer] risk is attributed to diesel particulate emissions." *See* Statement, section I, *supra*. The Fleet Rules will dramatically lower diesel exhaust emissions in the South Coast region, and the resulting health impacts. There can be no question, therefore, that the Fleet Rules further the extraordinarily important public health purpose at the core of the Clean Air Act.

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[11] The United States suggests to the Court that no harm would befall the District or, presumably, the residents of the South Coast from a holding that the Fleet Rules are preempted, since the State of California can adopt fleet rules pursuant to its authority under section 209(b). U.S. Br. 28-29. But this is far from an adequate "solution." Only California has a right to a waiver under section 209(b)—no other state or local government, including the District, has that option.

B. Preempting The Fleet Rules Would Not Further The Purpose Of Section 209(a) To Protect Manufacturers From Having To Produce A "Third Vehicle."

1. *Congress's purpose in enacting section 209(a) was to prohibit standards requiring the production of a "third vehicle."* In determining Congress's purpose in enacting a preemption provision, this Court has looked to the legislative history of the provision. *See Ours Garage & Wrecker Serv., Inc.* 536 U.S. at 440-42; *Medtronic, Inc.* 518 U.S. at 490-91. The text and legislative history of the Act makes clear that Congress intended to preempt state emission standards (other than California's) to protect manufacturers from having to produce vehicles to meet multiple emissions standards. As the Senate Report cited by the engine manufacturers, Pet. Br. 4, and the United States, U.S. Br. 19-20, provides: "The auto industry conversely was adamant that the nature of their manufacturing mechanism required a single national standard in order to eliminate undue economic strain on the industry." S. Rep. No. 90-403, at 33 (1967) (emphasis added).

In response to this concern, Congress allowed for only one variation from the federal standard in the form of a waiver for California. The Senate Report provides further: "The industry, confronted with only one potential variation, will be able to minimize economic disruption and therefore provide emissions control systems at lower costs to the people of the Nation." *Id.* While section 177 allows states to adopt the California standards, they must be identical to those standards. As the Conference Report on the 1990 Amendments to the Act states, section 177 thus prevents states "from imposing different emission requirements on new vehicles and engines that would place an undue burden on manufacturers by requiring them to produce materially different new vehicles," the so-called "third vehicle." Sen. Comm. On

Public Works, 103d Cong., 1st Sess., A Legislative History of the Clean Air Act Amendments of 1990, Serial No. 103-38, at 1022 (1993).

Thus, under section 209(a) and the opt-in provision in section 177, manufacturers will have to produce vehicles to meet only two standards—the federal and California standards. While the engine manufacturers cite to the House Report that states that preemption is "necessary in order to prevent a chaotic situation from developing in interstate commerce in new motor vehicles," Pet. Br. 4, *quoting* H.R. Rep. No. 90-728 at 21 (1967), it is precisely the burden of manufacturing a "third vehicle" that Congress had in mind as creating a "chaotic situation."

Contrary to the engine manufacturers' suggestion, the Fleet Rules simply do not require the creation of "third," "fourth," "fifth," and "sixth" vehicles, as they place no production burdens on manufacturers, either directly or indirectly. Pet. Br. 31. Rather, the Fleet Rules only require fleet operators to choose the cleanest vehicles from among those *already produced and certified* for sale. Further, under the Fleet Rules, if no alternative fuel vehicles are certified for sale in California, then the purchaser may purchase a diesel (or other noncompliant) vehicle. *See* Statement, section IV, *supra*. Under no circumstances, therefore, do the Fleet Rules require the production of a "third vehicle."[12]

The real "chaos" that the engine manufacturers seek to avoid is the economic impact on individual manufacturers

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[12] *Amici* AALA contend that the preemption provision was intended to protect "users"—by which they mean fleet operators—from having to purchase cleaner vehicles. AALA Br. 22. But that suggestion is premised entirely on committee reports from 1965—two years before section 209 was adopted, and at a time when the pending bill contained no preemption provision. It is clear that sections 209(a) and 177 protect manufacturers from having to produce a "third vehicle," but do not protect any alleged right of fleet operators to buy dirtier vehicles.

from a loss in market share that the Fleet Rules may cause. Under the Fleet Rules, some manufacturers may face a reduction in their sales in the region (those that sell fewer clean vehicles), while others may see an increase in their sales (those that sell a greater number of clean vehicles). But nowhere in the text or legislative history of section 209(a) did Congress express an intention to protect the market share of an individual manufacturer. Far from it, the fleet purchase requirements established by section 246 demonstrate that Congress assumed that nonattainment areas must limit the market share of manufacturers of dirtier engines in order to achieve clean air.

Because the Fleet Rules do not require the production of a "third vehicle," neither *American Automobile Mfrs. Ass'n v. Cahill*, 152 F.3d 196 (2nd Cir. 1998) ("*Cahill*"), nor *Commissioner*, 208 F.3d 1, supports the engine manufacturers' claim that the Fleet Rules are preempted. Pet. Br. 23, 26. Both *Cahill* and *Commissioner* concerned a state's adoption of standards pursuant to the opt-in provisions of section 177 of the Act. Unlike the Fleet Rules, the state laws at issue would have required the production of a "third vehicle" because the states had opted-into the "zero-emission" vehicle program that California had delayed. *Cahill*, 152 F.3d at 201. As the *Commissioner* court held, "[i]f a *production requirement*, such as the ZEV mandate, is not considered part of the standard itself, then the compliance with a standard . . . would be disconnected from the obligation to build cars to meet the standard." 208 F.3d at 7 (quoting an EPA opinion letter) (emphasis added). Again, the Fleet Rules impose no production mandates whatsoever on manufacturers, and so are not "standards".[13]

[13] Further, neither the *Cahill* nor *Commissioner* courts held that *all* regulations that "effect a general reduction in emissions" are preempted "standards" under section 209(a), as the engine manufacturers imply. Pet. Br. 23 n.3. The *Cahill* court held only that because the ZEV *production* mandate had "no purpose other than to effect a general reduction in emissions," it was a "standard relating to the control of emissions from new motor vehicles" and not an "enforcement procedure." *Cahill*, 152 F.3d at 200; *see also Commissioner*, 208 F.3d. at 7 ("if production requirements are not standards..., then other states could enact production requirements that were different from California's").

2. *Purchase requirements are not production mandates.* The engine manufacturers would have this Court find that "standards" under section 209(a) include fleet purchase requirements because, they claim, section 209(a) prohibits regulations that limit the sale of certified vehicles and "the sale and purchase of a new motor vehicle are two sides of the same coin." Pet. Br. 26. But their basic assumption is wrong—neither section 209(a) nor the motor vehicle provisions of the Act provides manufacturers with a *guarantee* that they will sell every vehicle certified to federal or California standards—even the lowest standards. Rather, as discussed above, section 209(a) protects manufacturers *only* from having to produce a "third vehicle."

As EPA (noticeably absent from the United States' brief) recognized in commenting on section 246, the fundamental difference between emissions standards and purchase requirements is that the former, but not the latter, place such a production requirement on manufacturers:

> [I]n adopting [section 246], Congress made a clear choice between two alternatives: *requiring* manufacturers to produce and sell [clean fuel vehicles] *or creating a market* for [clean fuel vehicles] and for clean alternative fuels by requiring fleet operators to purchase such vehicles and operate on such fuels.

63 Fed. Reg. 20103, 20105 (April 23, 1998) (emphasis added). EPA explained that "Congress intended that the creation of a market for [clean fuel vehicles] would *provide an incentive* for vehicle manufacturers to produce and sell

such vehicles." *Id.* at 20104 (emphasis added). Thus, as EPA acknowledged, while Congress preempted manufacturing mandates requiring the production of a "third vehicle," such mandates are very different from rules requiring fleet operators to purchase cleaner vehicles.

Accordingly, the engine manufacturers' argument that a state or local government could circumvent preemption by "requiring that every vehicle purchased must meet a novel emission standard," Pet. Br. 26, is misplaced. As EPA has made clear, purchase requirements do not mandate the production of vehicles and so are not "standards."[14] Moreover, this argument has no relevance to the Fleet Rules at issue here, which only require the purchase of vehicles that meet the California emission standards, not some "novel" standard adopted by the District.

3. *The Fleet Rules are indistinguishable from the incentive programs the United States acknowledges are not preempted.* The arguments by the engine manufacturers and United States, taken to their logical conclusion, would preempt state and local incentive programs designed to create markets for cleaner vehicles by providing tax incentives or otherwise offsetting the purchase price of a cleaner vehicle. California and the District, like many other state and local governments, have long depended on these vital programs to aid efforts to reduce localized air pollution. It makes no difference, as the United States argues, U.S. Br. 17 n.4, that incentive programs do not impose enforceable requirements in contrast to the

[14] Purchase requirements at most could "indirectly" cause the production of vehicles by creating incentives for manufacturers to produce cleaner vehicles. This Court has held in other contexts that such "indirect" impacts do not support preemption. *See De Buono*, 520 U.S. at 816 (state tax on hospital run by ERISA fund would "have some effect" on the administration of ERISA plans because of increase in cost of providing benefits to employees, but this "indirect" effect is not sufficient to preempt tax).

"requirements" of the Fleet Rules. Neither incentive programs nor fleet purchase requirements would pass the engine manufacturers' proposed test that any program that "references" CARB's or EPA's emissions standards, Pet Br. 27-28, or indirectly limits the sale of a vehicle, Pet. Br. 30, is preempted.

For example, California's Lower-Emission School Bus Program, which is aimed at getting children on cleaner buses by providing 75% of the cost of a new cleaner bus, describes the vehicles eligible for funding by reference to CARB's standards.[15] *See* Statement, section V, *supra*. So do most incentive programs. Likewise, incentive programs indirectly limit the manufacture of dirtier vehicles by creating a market for cleaner ones. This is particularly true of programs like the Lower-Emission School Bus Program, which virtually guarantee the purchase of cleaner vehicles over dirtier ones by covering close to the full cost of the cleaner bus.[16]

[15] California has neither sought, nor received, a waiver under section 209(b) for its incentive programs.

[16] The United States points to Section 249(f)(3), 42 U.S.C. § 7589(f)(3), to suggest that states have limited authority to adopt incentive programs. U.S. Br. at 18 n.5. That is not so. Section 110(a)(2)(A) of the Act, 42 U.S.C. § 7410(a)(2)(A), broadly allows states to adopt "economic incentives." Sections 249(f)(2) and (3) do not purport to limit that authority, but rather, make clear that while states other than California may not require manufacturers to produce "clean-fuel vehicles," they may include clean-fuel incentive programs in a revised state implementation plan. Section 249(f)(2) allows states "to provide incentives for the sale or use" of clean-fuel vehicles, without limitation. And while section 249(f)(3) lists three possible incentive programs, this list is not exclusive – Congress used the words "may include," not "may *only* include." Finally, section 249(f) is not among the preemption provisions listed in Section 116 as exceptions to the broad authority reserved to states and local governments.

In sum, neither purchase requirements like the Fleet Rules nor purchase incentives like the Lower-Emission School Bus Program are preempted. Congress has clearly expressed in the structure and language of the Act that new motor vehicle "standards" control the "production" but not the "purchase" of new motor vehicles. Indeed, since neither the Fleet Rules nor purchase incentive programs have any effect on manufacturers other than providing an *incentive* to produce cleaner vehicles, neither interferes with Congress's main purpose in enacting section 209(a)—to prevent manufacturers from being required to produce vehicles that must comply with 51 different state and federal standards.

CONCLUSION

The judgment of the courts below should be affirmed.

Respectfully submitted,

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